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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

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No. 333

IN THE MATTER OF
CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, A CORPORATION,

Debtor.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, A CORPORATION (SUBSTITUTED FOR BENJAMIN WHAM, TRUSTEE),

Petitioner,

vs.

ARTHUR F. GOURLEY,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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ARTHUR F. GOURLEY,

Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Chicago & Eastern Illinois Railroad Company, petitioner, prays for the writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment and order of that Court entered June 11, 1941 (R. 139-140).

The Senior Circuit Judge for the Seventh Circuit, speaking for the Court below, stated that this bankruptcy case "presents some amazingly unsettled questions" (R. 137). The questions are of public importance. Their significance goes far beyond this case. Broadly stated, the questions involve the proper construction of Section 24 of the Bankruptcy Act (11 U. S. C. 47) relating to appeals, and the proper construction of certain sections of the Act relating to administrative expenses and claims, particularly Section 77j in respect to "suits or claims for damages caused by the operation of trains, busses, or other means of transportation."

The statutes herein involved are set forth in the Appendix hereto, page 19 *et seq.*

A.

Summary Statement of the Matter Involved.

1. The review sought involves a claim filed by respondent, Arthur F. Gourley, hereinafter referred to as "claimant", against the Estate of Chicago and Eastern Illinois Railway Company, a corporation, Debtor, in a proceeding for reorganization of said company in the District Court for the Northern District of Illinois, Eastern Division, under Section 77 of the Bankruptcy Act (11 U. S. C. 205). Petitioner is a recently organized corporation to which the assets of the Debtor were transferred for the purpose of carrying out the plan of reorganization (R. 141). The District Court has entered a final decree terminating the reorganization proceedings, except as to the instant claim, and discharging the Trustee (R. 141-2). After said final decree, petitioner was substituted for the Trustee in the proceeding on this claim (R. 144).

2. The events giving rise to this controversy are as follows:

March 3, 1933—Section 77 of the Bankruptcy Act

providing for the reorganization of railroads became effective.

April 18, 1933—Petition for reorganization filed by the Debtor, Chicago and Eastern Illinois Railway Co., and approved (R. 8, 75). The Debtor was continued in possession (R. 8, 75).

August 3, 1933—Collision occurred between train operated by Debtor in possession and train operated by Illinois Central Railroad; claimant, engineer of Illinois Central train, suffered personal injuries (R. 5, 75).

September 15, 1933—Trustee of the Estate of the Debtor was appointed (R. 8, 75).

June 20, 1934—Claimant instituted suit in the Superior Court of Cook County, Illinois, against the Trustee for personal injuries alleged to have been suffered as a result of the Trustee's negligence (R. 5, 21, 75). The District Court entered no order authorizing or consenting to the liquidation of the claim in the state court. The Trustee filed an answer in the state court denying that he was operating the road at the time of the accident (R. 10, 27). Claimant thereupon filed an "additional count" in the state court naming both the Trustee and the Debtor as defendants, to which the Debtor answered and the Trustee moved to dismiss himself as a party on the ground that the alleged tort was committed before his appointment and he, therefore, was not liable (R. 14, 52, 58, 65). No order was ever entered on the Trustee's motion to dismiss (R. 16-17). Subsequently, claimant filed an amended complaint seeking relief against the Debtor only (R. 15). The Debtor filed an answer and on these pleadings the case was tried (R. 16).

June 18, 1938—State court judgment for $60,000 entered against Debtor (and not against Trustee) (R. 20, 75), upon direction of Illinois Appellate Court (R. 34-51; 295 Ill. App. 160). The record shows that the Trustee paid for the defense in the state court out of the Debtor's estate under "the general order" of the bankruptcy court; there was no specific order covering the fees (R. 13). The record also shows that

state court summons was served on an attorney in the legal department of the Debtor (R. 12-13).

December 1, 1938—Claimant filed proof of claim in the reorganization proceedings in the District Court (R. 2-4); the claim was referred to a Special Master with directions to hear the claim and report thereon (R. 2).

3. At the hearing before the Master, counsel for claimant and the Trustee agreed, upon the suggestion of the Master, that a preliminary report be made to the District Court for determination of the question of whether the state court judgment is conclusive (R. 68). The claimant put in evidence a certified copy of the state court judgment (Claimant's Exhibit 1, R. 19-20) and certain exhibits relating thereto, to-wit, abstract of state court record (Claimant's Exhibit 2), complaint in the state court (Claimant's Exhibit 3, R. 21-27), answer thereto of Trustee (Claimant's Exhibit 4, R. 27-33), notice of Supreme Court of Illinois of denial of petition for leave to appeal (Claimant's Exhibit 5, R. 34), and opinion of Appellate Court of Illinois (Claimant's Exhibit 6, R. 34-51). Claimant has not offered any evidence on the merits. *Claimant has not rested.*

4. The Master filed a preliminary report (R. 67) and an opinion (R. 69). The Master recommended that the state court judgment be held not conclusive (R. 67-68) because the state court suit was not authorized by the bankruptcy court as the manner of liquidation of the claim and the Trustee was not a party to the state court suit (R. 111). Claimant filed objections to the Master's Report in the District Court (R. 112).

5. The District Court overruled claimant's objections and confirmed the Master's Report (R. 114). The District Court's order, *inter alia,* provided (R. 114):

> "* * * the judgment obtained in the Superior Court of Cook County in favor of the claimant and against the Chicago and Eastern Illinois Railway

> Company, Debtor, founded on a tort committed by the Debtor while it was continued in possession under order of the court and before a trustee was appointed, in suit commenced after the appointment of the Trustee, and prosecuted without the order, direction, or consent of this Court, does not constitute a liquidation of the claim for the purpose of proof and allowance in these proceedings."

The District Court's order also contained the following (R. 114):

> "It is Further Ordered, Adjudged, and Decreed that the claim be sent back to the Special Master for hearing on the merits apart from the judgment itself and for a further report thereon."

The District Court did not enter findings of fact and conclusions of law. The District Court's order did not reject the claim. Nevertheless, claimant appealed to the Court of Appeals (R. 115).

6. In the Court of Appeals the Trustee filed a motion to dismiss the appeal on the grounds (1) that the Court of Appeals had no jurisdiction under Section 24 of the Bankruptcy Act (11 U. S. C. 47) because the District Court's order is not appealable, and (2) that claimant had failed to furnish a proper record including findings of fact and conclusions of law (R. 128). The Court of Appeals denied the motion (R. 140). The Court stated the following "bases" for its holding (R. 138):

> "(1) The distinctions between 'proceedings in bankruptcy' and 'controversies arising in bankruptcy proceedings' as they originally existed in Section 24 of the Bankruptcy Act, have been eliminated by the Chandler Act. *Dickinson Co.* v. *Cowan*, 309 U. S. 387. See also the Senate Committee Report.
>
> (2) The decree (or order) of the District Court is a final decree, at least in part, and therefore under any circumstances is appealable.
>
> (3) The order is appealable under Section 24, even though it were not a final order.

(4) The litigation on this claim, which arose after adjudication of debtor, and out of the operation of the debtor, is a proceeding in bankruptcy, and an appeal lies from an adverse order made therein, whether said order is final or interlocutory. The fact that the claim arose out of the operation of the railroad *after the adjudication* is significant.

(5) Plaintiff's claim is in the nature of an administrative expense, which would, were it not for the proviso of Section 77(j) be subject to the court's approval. Section 77(j), upon the facts here shown, takes from the District Court all controversy as to amount where there has been a trial and a judgment in another court of competent jurisdiction. Its nature and status as an administrative expense, rather than a claim of a creditor against the debtor who later is adjudged a bankrupt, serves to emphasize its 'proceeding in bankruptcy' character, from an order in which an appeal will lie, whether final or interlocutory."

7. On the merits, the Court of Appeals reversed the District Court's order, with directions to proceed in accordance with the views expressed (R. 139-140). The Court of Appeals held (1) that under the proviso of Section 77(j) of the Bankruptcy Act (11 U. S. C. 205j) a claim arising after approval of the petition out of the operation of a train, bus, or other means of transportation may be liquidated in any court of competent jurisdiction without the authorization or consent of the Bankruptcy court; and (2) that if Section 77(j) requires the consent of the bankruptcy court for such liquidation, the consent "need not be evidenced by formal order", and "implied consent" is found here in the bankruptcy court's "action in authorizing the defense of this case in the state court and the payment of the costs of such defense" (R. 135-6).

B.

Jurisdiction.

The jurisdiction of this Court is sustained by Section 24(c) of the Bankruptcy Act (52 Stat. 854, 11 U. S. C. 47c), and by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347a). The judgment and order of the Court of Appeals were entered on June 11, 1941 (R. 139-140). No petition for rehearing was filed in that Court. The present petition is filed within three months of the entry of the judgment and order of the Court of Appeals.

C.

Questions Presented.

1. Under Section 77(j) of the Bankruptcy Act, may a claim for operating expenses arising after the adjudication out of the operation of a train be liquidated in any court of competent jurisdiction without the authorization or consent of the bankruptcy court, and is a judgment obtained in such liquidation binding on the bankruptcy court?

2. Does the proper construction of Section 77(j) limit that section to claims arising before the adjudication, and are administrative expenses arising after the adjudication governed by Section 62(a) of the Bankruptcy Act (11 U. S. C. 102) which provides that administrative expenses shall be "examined and approved or disapproved by the (bankruptcy) court"?

3. If the proviso of Section 77(j), properly construed, applies to claims arising after the adjudication, does Section 77(c-7) require that the bankruptcy court authorize and consent to the liquidation of such claim in another court?

4. If the authorization and consent of the bankruptcy court in a reorganization proceeding under Section 77 of the Bankruptcy Act is required for liquidation in another court of a claim arising after the adjudication out of the operation of a train, was such authorization and consent given here?

5. Is the debtor's estate in this case bound by the state court judgment against the naked debtor corporation entered after the appointment of the Trustee?

6. Does Section 66 of the Judicial Code (28 U. S. C. 125) permit that a claim arising after an adjudication under Section 77 of the Bankruptcy Act be liquidated in another court without leave of the bankruptcy court?

7. Is the District Court's order that the state court judgment is not conclusive and sending the claim back to the Master for hearing on the merits, appealable under Section 24 of the Bankruptcy Act?

8. Is the old distinction between "controversies" and "proceedings in bankruptcy" abolished under the present Section 24 of the Bankruptcy Act?

9. If the old distinction is not abolished, is this a "controversy" or a "proceeding" under Section 24 of the Bankruptcy Act?

10. If the old distinction is not abolished and if this is a "controversy", is the District Court's order appealable under Section 24 of the Bankruptcy Act as "a final decree, at least in part"?

11. If the old distinction is not abolished and if this is a "proceeding", is the District Court's order appealable as an "interlocutory" order within the meaning of Section 24 of the Bankruptcy Act?

12. Was it proper for the Court of Appeals to consider the appeal in view of the fact that the District Court did not, as required by 52(a) of the Rules of Civil Procedure (28 U. S. C. following 723c), enter findings of fact and conclusions of law?

D.

Reasons for Allowance of the Writ.

1. *Importance of decision on construction of Section 77 of the Bankruptcy Act.* The large number of railroads being reorganized under Section 77 emphasises the public importance of a decision by this Court settling the procedure on liquidation of claims arising after adjudication out of the operation of trains, busses, or other means of transportation. Contrary to the opinion of the court below (R. 134-135), the questions are not limited to personal injury claims, but apply as well to claims for damage to property arising out of the operation of trains, etc. Petitioner submits that the decision below will greatly impede the reorganization of railroads under Section 77 and handicap the bankruptcy courts in prompt and efficient disposal of such proceedings. Under the decision below, other creditors are not advised by the bankruptcy record as to when and how claims arising out of the operation of trains, etc. are being liquidated. The bankruptcy court cannot adequately control the disposition of such claims. The decision below is upon important questions of Federal law which have not been, but should be, settled by this Court.

2. *Importance of decision on construction of Section 24 of the Bankruptcy Act relating to appeals.* As pointed out in the brief in support hereof (p. 16, *post*), the decision of the Court below in respect to the appealability of the District Court's order is in conflict with a decision of the Circuit Court of Appeals for the Third Circuit. The public importance of the questions is patent. The questions are not limited to appeals in proceedings under Section 77. Most of the appeals in bankruptcy proceedings arise under Section 24. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

WHEREFORE, your petitioner prays that the writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit for the purpose of reviewing the questions herein specified; that the judgment of the said Court of Appeals be reversed; and that petitioner be granted such other and further relief as to this Honorable Court shall seem meet.

GEORGE I. HAIGHT,
K. L. RICHMOND,
Attorneys for Petitioner.

BRIEF FOR PETITIONER IN SUPPORT OF THE PETITION FOR THE WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Special Master appears at R. 69-112.

The opinion of the District Court appears at R. 123-124, and is not reported.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears at R. 129-138, and is not yet reported.

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are stated in the foregoing petition (p. 7, *supra*).

Statement of the Case.

The case is stated in the foregoing petition (pp. 2 to 6, *supra*).

Specification of Errors.

The errors intended to be urged are those specified in the petition under "Questions Presented" (p. 7, *supra*), the Court below having ruled adversely to petitioner or failed to rule upon the questions there stated.

Summary of Argument.

I.

THE STATE COURT JUDGMENT IS NOT CONCLUSIVE IN THE BANKRUPTCY COURT.

A. Section 77(j) applies only to claims arising prior to adjudication. Claims arising after the adjudication for personal injuries alleged to result from negligence in the operation of the railroad are administration expenses, governed by Section 62(a) of the Bankruptcy Act (11 U. S. C. 102).

B. If Section 77j applies to claims arising after adjudication, that Section does not negative the requirement of Section 77 c-7 (11 U. S. C. 205 c-7) that the bankruptcy court shall "fix * * * the manner in which such claims (*i. e.*, claims of creditors) may be filed or evidenced and allowed."

C. In view of Section 77(a), which gives the bankruptcy court "exclusive jurisdiction of the debtor", the debtor's estate is not bound by the state court judgment entered against the naked debtor corporation.

D. Section 66 of the Judicial Code (28 U. S. C. 125) does not apply to a proceeding under Section 77 of the Bankruptcy Act.

II.

THE DISTRICT COURT'S ORDER IS NOT APPEALABLE.

A. Section 24 of the Bankruptcy Act, as amended, retains the distinction between "controversies" and "proceeding" (*In re Winton Shirt Corp.*, 104 Fed. (2d) 777, 779, C. C. A. 3).

B. This is a controversy (*In Re Torgovnick*, 49 Fed. (2d) 211, C. C. A. 2; *Re Breyer Printing Co.*, 216 Fed. 878, 880, C. C. A. 7).

C. In a controversy, only a final order is appealable (Section 24 of the Bankruptcy Act, 11 U. S. C. 47).

D. The District Court's order is not final.

E. Even if this is a "proceeding", the District Court's order is not appealable because it is not "interlocutory" within the meaning of Section 24 of the Bankruptcy Act.

ARGUMENT.

I.

The State Court Judgment Is Not Conclusive in the Bankruptcy Court.

A. Section 77j applies only to claims arising prior to adjudication. Claims for personal injuries arising after the adjudication and allegedly due to negligent operation of the railroad are administrative expenses governed by Section 62(a) of the Bankruptcy Act (11 U. S. C. 102).

Section 77j is limited to "suits against the debtor." Only suits on causes of action arising prior to adjudication can be against the debtor. Causes of action arising subsequently are against the trustee or the debtor in possession. The proviso of Section 77j is no broader than the language it limits. The Court below held that the instant claim, which arose after the adjudication, is an "administrative expense" (R. 138). Claimant makes the same assertion (R. 4). Section 62(a) is applicable by virtue of Section 77(l). The language of Section 62(a) is clear and mandatory: Administrative expenses "shall * * * be * * * examined and approved or disapproved by the (bankruptcy) court."

B. If Section 77j applies to claims arising after adjudication, that section does not negative the requirement of Section 77 c-7 (11 U. S. C. 205 c-7) that the bankruptcy court shall "fix * * * the manner in which such claims (i. e., claims of creditors) may be filed or evidenced and allowed."

A judgment entered after adjudication is binding in neither liquidation bankruptcy (*In Re James A. Brady Foundry Co.*, 3 Fed. (2d) 437, C. C. A. 7) nor in corporate

reorganization (*In Re Paramount Publix Pictures Corp.*, 85 Fed. (2d) 42, C. C. A. 2). The question was expressly reserved by this Court in *Riehle* v. *Margolies*, 279 U. S. 218, 228. The bankruptcy court record must show where and how claims are being liquidated so that other creditors may, if they wish, contest claims (*In Re Paramount Publix Pictures Corp.*, 85 Fed. (2d) 42, 43-44, C. C. A. 2). The same requirement is made by Section 77 c-7. Section 77j does not negative that requirement. It provides only that if authorization and consent be sought in cases arising out of the operation of trains, etc., authorization and consent will be given. Cf. *Rodabaugh* v. *Denny*, 24 Fed. Supp. 1011 (D. C., N. Y.) where the claim arose before adjudication and where the bankruptcy court had expressly ordered that claims arising out of the operation of trains, etc., might be filed and prosecuted to judgment in any court of competent jurisdiction.

The decision of the Court below that the authorization and consent of the bankruptcy court were unnecessary is plainly contrary to the statute.

C. In view of Section 77(a), which gives the bankruptcy court "exclusive jurisdiction of the debtor", the debtor's estate is not bound by the state court judgment entered against the naked debtor corporation.

Section 77(a) provides that the bankruptcy court "shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor. * * *" The state court had no jurisdiction over the debtor corporation. The judgment entered against that corporation is void because of the state court's lack of jurisdiction. *McDonald* v. *Mabee*, 243 U. S. 90, 92. No matter what the Trustee did in the state court, he did not and could not confer on that court jurisdiction over the subject-matter.

D. Section 66 of the Judicial Code (28 U. S. C. 125) does not apply to a proceeding under Section 77 of the Bankruptcy Act.

Section 66 of the Judicial Code, providing for suits against a "receiver or manager of property" without leave of the court appointing him, relates to equity receiverships, and there appears to be no basis for extending the statute to trustees and debtors in possession in reorganization proceedings. The rights and liabilities of trustees and debtors in possession are covered by the Bankruptcy Act. Cf. *Anderson* v. *Scandrett*, 19 Fed. Supp. 681 (D. C., Minn.) and *In re James Butler Grocery Co.*, 12 Fed. Supp. 851 (D. C., N. Y.).

The public importance of a decision by this Court on the questions respecting the construction of Section 77 is manifest.

II.

The District Court's Order Is Not Appealable.

A. Section 24 of the Bankruptcy Act, as amended, retains the distinction between "controversies" and "proceedings."

The Court below stated the following as one of the "bases" of its holding:

> "The distinctions between 'proceedings in bankruptcy' and 'controversies arising in bankruptcy proceedings' as they originally existed in Section 24 of the Bankruptcy Act have been eliminated by the Chandler Act. *Dickinson Co.* v. *Cowan*, 309 U. S. 387. See also Senate Committee Report." (R. 138.)

In re Winton Shirt Corp., 104 Fed. (2d) 777 (C. C. A. 3), the Court said at page 779:

> "By the amendment (Section 24 of the Chandler Act) the troublesome distinction between 'contro-

> versies' and 'proceedings' existing under the prior statute has been eliminated except that it appears that appeals in controversies may be taken only from final orders, decrees, or judgments."

The distinction is preserved according to the authoritative text writers: Moore, Bankruptcy Manual, 1939, pages 88, 95-97; Remington on Bankruptcy, 4th Ed., Vol. 8, 1940, Supplement, Sec. 3704; Collier on Bankruptcy, 14th Ed., Vol. 2, pp. 734-5; Finletter on Bankruptcy Reorganization, 1939, pp. 609-610; Gerdes Corporate Reorganizations, 52 Harvard Law Review 1, 37. This Court should settle the conflict between circuits.

The case of *Dickinson Co.* v. *Cowan*, 309 U. S. 382, did not involve the questions here in issue. The question in that case was whether an order respecting compensation to a bondholders' committee in a corporate reorganization proceeding was appealable as of right or by permission of the reviewing court in view of Section 250 of the Chandler Act.

B. This is a "controversy."

The instant case is a contest between the Trustee and general creditors on the one hand and a third party on the other hand. It is not a dispute within the bankruptcy family. This case falls within the accepted definition of a "controversy" (*In re Torgovnick*, 49 Fed. (2d) 211, C. C. A. 2; *Re Breyer Printing Co.*, 216 Fed. 878, 880, C. C. A. 7). The decision of the Court below that this is a "proceeding" conflicts with the foregoing decisions.

This Court should settle the conflict between circuits.

C. In a "controversy", only a final order is appealable.

The language of Section 24 of the Bankruptcy Act manifests Congressional intent to change in some instances the mode of review, but not to enlarge the jurisdiction of the Courts of Appeals by authorizing appeals from interlocu-

tory orders in "controversies." The words "either interlocutory or final" in the statute clearly modify only the word "proceedings." The decision below plainly conflicts with the decision of the Court of Appeals for the Third Circuit in *In re Winton Shirt Corp.*, 104 Fed. (2d) 777, 779.

D. The District Court's order is not final.

The District Court's order, which neither rejects nor allows the claim, is not final. The statement of the Court below that the "decree (or order) of the District Court is a final decree, at least in part" (R. 138) is meaningless.

E. Even if this is a "proceeding", the District Court's order is not appealable because it is not "interlocutory" within the meaning of Section 24 of the Bankruptcy Act.

An order allowing a claim is in fact only "interlocutory." Section 57k (11 U. S. C. 93k) provides that at any time before the estate is closed an allowed claim may be reconsidered and "reallowed or rejected in whole or in part." Congress did not intend piecemeal review.

A decision by this Court on the construction of Section 24 of the Bankruptcy Act is of great public importance.

It is respectfully submitted that the prayer of the petition should be granted.

GEORGE I. HAIGHT,
K. L. RICHMOND,
Attorneys for Petitioner.

APPENDIX.

Pertinent Statutes.

Section 77(a) of the Bankruptcy Act (11 U. S. C. 205a):

"(a) * * * the court (*i. e.*, bankruptcy court) * * * shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located. * * *"

Section 77 (c-7) of the Bankruptcy Act (11 U. S. C. 205 c-7):

"(c-7) The judge shall promptly determine and fix * * * the manner in which such claims (*i. e.*, claims of creditors) may be filed or evidenced and allowed * * *"

Section 77(j) of the Bankruptcy Act (11 U. S. C. 205j):

"(j) In addition to the provisions of section 11 of this Act (§ 29 of this title) for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree: Provided, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated."

Section 77(L) of the Bankruptcy Act (11 U. S. C. 205L):

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons

with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Section 62(a) of the Bankruptcy Act (11 U. S. C. 102a):

"The actual and necessary costs and expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."

Section 66 of the Judicial Code (28 U. S. C. 125):

"Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

Section 24 of the Bankruptcy Act (11 U. S. C. 47):

"Jurisdiction of appellate courts.—a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: Provided, further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Section 6(b) of the Chandler Act, effective September 22, 1938 (Note, 11 U. S. C. 1):

"Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect."

(2)

FILED
SEP 10 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 333

IN THE MATTER OF
CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY, a Corporation,
Debtor.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, a Corporation (Substituted for Benjamin Wham, Trustee)
Petitioner,

vs.

ARTHUR F. GOURLEY,
Respondent.

ANSWER OF THE RESPONDENT TO THE PETITION FOR CERTIORARI.

JOSEPH D. RYAN,
Attorney for Respondent.

CHAMPLIN-SHEALY COMPANY, CHICAGO

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Petitioner,

vs.

ARTHUR F. GOURLEY,

Respondent.

ANSWER OF THE RESPONDENT TO THE PETITION FOR CERTIORARI.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

At the risk of repetition we will state the pertinent facts briefly.

Claimant was injured on August 3, 1933, in an accident caused by the operation of a train. This train was operated by the debtor corporation, continued in possession by order of the court, no trustee having been appointed.

In due course a trustee was appointed, who took charge of the railroad. Claimant subsequently brought suit in a state court to recover for his injuries, demanding a jury trial. This suit was brought against the trustee.

The trustee appeared in the state court suit and defended on the ground, among other things, that he was not in possession or control of the railroad at the time of the accident (R. 27). Neither in this answer nor in any subsequent pleading did the trustee assert that the suit could not be maintained because the District Court had not authorized liquidation in this manner, or that the state court lacked jurisdiction. These defenses were urged only in the federal courts, and at a much later date.

Taking the trustee's plea of non-operation and control at its face value, claimant filed an additional count against the debtor corporation, setting up the same cause of action, but impleading the corporation as an additional defendant. A summons was issued against the new defendant on the additional count, and service was had on an attorney formerly in the legal department of the debtor, but at the time of service in the employ of the trustee (R. 12). The trustee caused an answer to be filed in behalf of the debtor corporation, tendering issue on the merits, and thereby and thereafter chose to defend the suit through the medium of the debtor. He remained in charge and control of the litigation throughout its entire course, and the expenses of the defense were paid by the estate, under the general order of the District Court (R. 130, 131).

After the answer to the additional count was filed, the trustee made a motion to be dismissed from the case, on the ground that the tort was committed prior to his appointment, and he was not liable for torts committed at that time (R. 65); to this motion was attached an affidavit in which the trustee averred that "there was no person or persons appointed or acting as Trustee of said estate" at the time of the accident (R. 66). No order was entered on this motion (R. 16). All the pleadings up to this point bore the names of both defendants in the title.

Some time later an amended complaint was filed, charging negligence against the debtor only. No order dismissing the trustee was ever entered.

The case went to trial, and the jury returned a verdict for claimant in the amount of $80,000 (R. 34, 35). This verdict was set aside by the trial court for alleged error of law (on grounds with which we are not concerned), and judgment was rendered for the defendant notwithstanding the verdict (R. 37).

Claimant appealed to the Illinois Appellate Court, which reversed the judgment of the trial court and remanded the case, with directions to enter a judgment in claimant's favor for $60,000, after requiring a remittitur of $20,000 to cure an alleged excessiveness in the verdict (Claimant's Ex. 6, R. 34, *et seq.*).

The Illinois Supreme Court denied leave to appeal, thus making the judgment final (R. 34).

The expenses of defending the case were paid by the trustee under the general order of court, as an administrative expense (R. 13).

Claimant then presented his judgment to the District Court, whereupon it was referred to a master for consid-

eration. It was agreed between the master and the parties that his report on the legal questions involved, i. e., the validity and effect of the state court judgment, might be made before any other question was taken up (R. 17, 18).

The trustee at first conceded that claimant's state court judgment was a final and binding liquidation of the claim (R. 7). Later, his position was changed, and he asserted non-liability because the judgment was against the corporation, not the trustee (R. 18).

After the master made his report, finding that the state court judgment was not a liquidation of the claim, the matter came on before the District Court, which confirmed the report, holding that (R. 123):

> * * * "The Trustee was not a party to the action in the Superior Court of Cook County and is not estopped to question the judgment of that court. The estate of the debtor has never had a hearing and is entitled to one."

C.

QUESTIONS PRESENTED.

We submit that there are only two questions of any importance presented here. They are as follows:

1. Is a claim for personal injuries incurred in a train accident, at a date subsequent to the filing of a petition under Section 77 of the Bankruptcy Act, suable in a state court by virtue of the proviso to Section 77j of that Act?

2. After a trustee has resisted a personal injury claim against the debtor's estate, arising out of a transportation accident, has participated in a jury trial, has followed and controlled the litigation through two courts of appeal, has paid the expenses of litigation and had such payment approved, and has finally lost his case, may he insist in the District Court, for the first time, that the judgment was against the debtor and not against the trustee, and that the merits of the claim should be relitigated?

D.

REASONS FOR ALLOWANCE OF THE WRIT.

1. There is no showing that adherence to the decision of the Court of Appeals will greatly or at all impede the reorganization of railroads under Section 77, or handicap the bankruptcy courts in disposal of such proceedings. The instant case has not impeded the reorganization of the railroad involved, since a final decree has been entered (R. 141, 142). How liquidation of a tort claim by jury trial in a state court could possibly handicap a bankruptcy court in disposal of reorganization proceedings is not made plain at all. On the contrary, by transferring to other courts the exacting task of liquidating personal injury claims, the bankruptcy courts are relieved of an onerous burden. The fact that claims which may be liquidated by jury trials include property damage as well as personal injury claims is a distinction without significance. The argument that all creditors may not be advised as to how claims are being liquidated is fallacious, since the trustee defends in behalf of the creditors as well as of himself, and so represents the creditors in jury trials.

2. The fancied conflict between the decisions of the Third and Seventh Circuits as to whether the Chandler Act has abolished all distinctions between "proceedings" and "controversies" is moot in this case, since both circuits are in agreement that an appeal lies from interlocutory orders in "proceedings," and it is clear that the present appeal is a "proceeding."

SUMMARY OF ARGUMENT.

I.

THE STATE COURT JUDGMENT IS FINAL AND CONCLUSIVE AS A LIQUIDATION OF A TORT CLAIM ARISING OUT OF THE OPERATION OF A TRAIN; THIS JUDGMENT IS BINDING ON THE BANKRUPTCY COURT.

A. The proviso to Section 77j applies to all tort claims arising out of the operation of trains, whether occurring prior to adjudication or afterward, and whether administrative or otherwise.

B. The plain language of the proviso to Section 77j is controlling as to the method and manner of allowance of such claims as are therein dealt with.

C. The general language of Section 77a, insofar as it touches on claims for transportation torts, must yield to the express provisions of Section 77j for the liquidation of such claims.

D. The debtor in possession occupies a position analogous to an equity receiver. Our position, however, is not based on this theory, but is grounded on the provisions of Section 77j.

II.

THE DISTRICT COURT'S ORDER IS APPEALABLE.

A. The Chandler Act has abolished the distinction between "controversies" and "proceedings."

B. This is a "proceeding."

C. Since this is a "proceeding," an inquiry as to whether certain orders in "controversies" are appealable is futile.

D. The District Court order was final, in so far as it attempted to nullify the state court judgment.

E. The order is final, or, at the most, final in part and interlocutory in part. There is no third classification.

ARGUMENT.

I.

THE STATE COURT JUDGMENT IS FINAL AND CONCLUSIVE AS A LIQUIDATION OF A TORT CLAIM ARISING OUT OF THE OPERATION OF A TRAIN; THIS JUDGMENT IS BINDING ON THE BANKRUPTCY COURT.

A. The proviso to Section 77j applies to all tort claims arising out of the operation of trains, whether occurring prior to adjudication or afterward, and whether administrative or otherwise.

Section 77j is not limited to "suits against the debtor," as petitioner supposes. True, in the first clause it deals with this subject. The second clause, manifestly independent of the first, since touching a totally unrelated subject matter, refers to proceedings to enforce liens "upon the estate," not "against the debtor." The third clause has to do with another entirely different subject, viz., suits or claims for damages arising out of transportation accidents, and creates an entirely new remedy for this class of claims. This clause is not dependent upon either of the two preceding clauses. Obviously it cannot be construed to modify the clause immediately preceding it, which deals with liens. What basis is there for assuming that this clause, independent in form and complete in itself, modifies or limits the most remote clause in the paragraph?

There is no qualification whatever in this proviso. It is not limited to suits against the debtor. It is not restricted in point of time. Had Congress wished to differentiate between claims arising before and after the petition, it would

have been a very simple matter so to provide in the act. This Congress failed to do. We can perceive no reason why the court should do it.

It is obvious that by this proviso Congress intended to confer on tort claimants the same rights to bring suit which they enjoyed in cases arising under equity receiverships. The trustee is a receiver or a manager within the meaning of Section 66 of the Judicial Code. (*In re Avorn Dress Co.*, 78 Fed. (2) 681, 683; *In re James Butler Grocery Co.*, 12 Fed. Supp. 851, 853, 854.) Clearly, it was the intention of Congress that the trustee could be sued in the same manner and to the same extent that an equity receiver or manager might be sued. (*Riehle* v. *Margolies*, 279 U. S. 218; *Chicago T. & T. Co.* v. *Fox Theatres Corp.*, 69 Fed. (2) 60.)

Section 77c-7 provides that the judge shall determine and fix the manner in which claims of creditors may be evidenced and allowed. Section 62a of the Bankruptcy Act provides that the expenses of administration shall be approved or disapproved by the court. Petitioner takes the position that Section 77j, permitting suits on transportation torts to be brought in the state courts, overrules Section 77c-7 where general claims are concerned, but must yield to Section 62a where administrative expenses are concerned. No adequate reason is suggested for the distinction, and we submit that the proviso to Section 77j is controlling in all cases of transportation claims, whether occurring before or after adjudication, and hence, whether general or administrative in their nature.

In its carefully reasoned opinion, analyzing the proviso from the standpoint of sentence structure as well as discussing the question of legislative intent as shown by the statute as a whole, the Circuit Court of Appeals demonstrates that the proviso to Section 77j is controlling here (R. 133-136).

B. The plain language of the proviso to Section 77j is controlling as to the method and manner of allowance of such claims as are therein dealt with.

In *Riehle* v. *Margolies*, 279 U. S. 218, this court held that suits against an equity receivership, prior to the appointment of a receiver, might be prosecuted to judgment in state courts. The court reserved the question of whether the same rule would be applicable to an action commenced after appointment of the receiver. In *Chicago T. & T. Co.* v. *Fox Theatres Corp.*, 69 Fed. (2) 60, the court held that the rule should be extended to such actions.

Section 77j does not provide, as claimed by petitioner (brief, p. 15), that "if authorization and consent be sought in cases arising out of the operation of trains, etc., authorization and consent will be given." The section provides that such claims may be prosecuted to judgment in any court of competent jurisdiction, and any order staying the prosecution of such suits shall be vacated. In a further provision it holds such orders null and void. Nothing in the language employed in 77j or in any other section can be tortured into a requirement that consent to sue be obtained, an obviously useless act, since consent cannot be withheld, and an order withholding it is a nullity. See *Anderson* v. *Scandrett*, 19 Fed. Supp. 681, 683. Nor need creditors be apprised of the state court suit. They would have no right to enter into or contest the proceedings; they are represented by the trustee, who acts in behalf of all, under the direction and control of the bankruptcy court.

C. The general language of Section 77a, insofar as it touches on claims for transportation torts, must yield to the express provisions of Section 77j for the liquidation of such claims.

Although Section 77a provides that the bankruptcy court shall have exclusive jurisdiction over the debtor, Section 77j permits suits on transportation claims to be brought in state courts. This grant of jurisdiction must be held to modify the otherwise exclusive jurisdiction of the bankruptcy court; or else 77j is meaningless.

Such an interpretation would deprive persons injured in transportation accidents of the right to a trial by jury, a right expressly and specifically granted by Congress. Their remedy conferred by 77j would be revoked by 77a. The clear intent of Congress to permit jury trials in this class of cases would be ignored.

It is by no means clear that the "naked debtor corporation" was not the proper and only defendant in the state court suit. It was operating the road when the accident occurred, and claimant was injured through the negligence of its servant. It is a railroad corporation, not a trust company; it is not capable of acting as trustee. (Gerdes on Corporate Reorganizations, Sec. 454, 922.) To sue it as "agent of the court" would lend no additional validity to the proceedings.

The trustee was obligated to defend the suit; this he chose to do through the medium of the debtor corporation. His actions were ratified by the District Court when his expenses in defense were approved as an expense of administration. The estate of the debtor was the fund ultimately liable for payment of the claim, whether it was brought into court in its own capacity, or by its trustee. One who defends a suit in the name of another, to defend

his own right, is bound by the judgment rendered, and is estopped from claiming the judgment was taken against the wrong party. (*Souffront* v. *Compagnie Des Sucreries*, 217 U. S. 475, 487; *Lovejoy* v. *Murray*, 3 Wall 1, 18, 19.)

D. The debtor in possession occupies a position analogous to that of an equity receiver. Our position, however, is not based on this theory, but is grounded on the provisions of Section 77j.

Our position is not dependent for its validity upon the applicability of Section 66 of the Judicial Code to proceedings under Section 77 of the Bankruptcy Act, although Section 66 has been held applicable in *In re Avorn Dress Co.*, 78 Fed. (2) 681, 683, and *In re James Butler Grocery Co.*, 12 Fed. Supp. 851, 853, 854. Our right to sue is derived from Section 77j of the Bankruptcy Act, where it is conferred in express terms.

II.

THE DISTRICT COURT'S ORDER IS APPEALABLE.

A. The Chandler Act has abolished the distinction between "controversies" and "proceedings."

The intent of the Chandler Act was to do away with the technicalities which had grown in the practice, and to simplify the procedure as far as practicable. No explanation is given by petitioner for the retention of the old, outmoded and shadowy distinction between proceedings and controversies; no reason is mentioned why the difference should be abolished in all other respects, but retained in the method of taking appeals. A fair interpretation of the act is that the distinction is abolished.

This court, in *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, 387, remarked that Congress intended to eliminate

all the old distinctions between controversies and proceedings. The court quoted the Senate Committee Report to the effect that, "appeals may be made as of right in all cases involving $500.00 or more." The court then noted one exception to this rule, viz., appeals on fee allowances, and that exception was based on Sec. 250, and not on Sec. 24. The Circuit Court of Appeals in the present case followed the *Dickinson* case strictly.

In re Winton Shirt Corporation, 104 Fed. (2) 777 (C. C. A. 3), was concerned with whether an appeal could be taken as a matter of right from an order of the District Court, or whether leave of the reviewing court was necessary. The court dealt with the proviso to the Act, requiring leave to appeal to be granted where less than $500.00 was involved; and the particular question decided was whether when no definite sum of money was involved, the $500.00 limitation required appellant to obtain leave to appeal.

While the court stated that "it appears that appeals in controversies may be taken only from final orders, decrees or judgments" (p. 779), this language was not necessary to the decision of the case, was dictum pure and simple, and this court should not deem it necessary to take jurisdiction of the present case in order to correct *obiter dictum* in a case long disposed of.

This court announced, in *Layne Co.* v. *Western Well Works,* 261 U. S. 387, 393, that even though certiorari were granted to resolve a supposed conflict between circuits, it would be dismissed if examination failed to disclose "a real and embarrassing conflict of opinion and authority" (p. 393).

There is, in reality, no conflict between circuits.

B. This is a "proceeding."

Even were the old distinction between "controversies" and "proceedings" still of any practical value, our situation is unchanged. This is a "proceeding," not a "controversy."

In *Coder* v. *Arts*, 213 U. S. 223, where a mortgagee of the bankrupt filed a claim, but did not waive his security, the court distinguished cases in which the claimant asserted title to the property of the bankrupt, and held the mortgagee's claim a "proceeding" (pp. 234, 235).

The foregoing case was cited and followed in *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 118.

In re Jayrose Millinery Co., 93 Fed. (2) 471, concerned a claim for sales taxes in which priority was asserted. This was held a "proceeding," following the *Coder* case, 213 U. S. 223, *supra*.

This is an expense of administration. Questions arising out of such expenses are "proceedings." See Collier on Bankruptcy, 14th Ed., Vol. 2, p. 739, Sec. 24.15.

In re Torgovnick, 49 Fed. (2) 211 (C. C. A. 2), cited by petitioner, it is held that (p. 212):

> "* * * 'controversies' are those matters which arise between the estate as a whole and persons who have legal relations with it other than as creditors."

In the instant case, claimant is a creditor of the estate, therefore, by petitioner's own definition, *supra*, this is not a "controversy."

From the other case cited by petitioner, *In re Breyer Printing Co.*, 216 Fed. 878, we learn (p. 880):

> "'Proceedings in bankruptcy' cover * * * allowance and disallowance of claims * * *. Controversies * * * involve questions between the receiver or trus-

> tee representing the bankrupt and his general creditors, as such, on the one hand, and adverse claimants on the other, concerning property in the possession of the receiver or trustee or of the claimants."

The instant case does not concern property in the possession of the trustee, or seek to impose any lien upon or claim of title to property of any kind whatever. Clearly, according to the cases cited, this is a "proceeding."

The decision in our case is in no sense in conflict with the two cases last cited.

Since this is a "proceeding," and not a "controversy," it matters not whether the order appealed from is final or interlocutory.

C. Since this is a "proceeding," an inquiry as to whether certain orders in "controversies" are appealable is futile.

We have shown under the preceding headings that this is a "proceeding." This being true, it is unnecessary to take the time to pursue an academic inquiry into whether interlocutory orders in "controversies" are appealable. This question is entirely foreign to the matter in hand.

D. The District Court order was final, in so far as it attempted to nullify the state court judgment.

At the suggestion of the special master, all parties agreed that a report should be made on the single question of whether the state court judgment was final (R. 18). In view of this agreement, petitioner should not now be heard to say that the report and the decree confirming it are not final, as to all questions embraced therein. The action of the court in nullifying the effect of the state court judgment is final (2 R. C. L. 40).

E. The order is final, or, at the most, final in part and interlocutory in part. There is no third classification.

As we have shown, that part of the order which nullified the state court judgment was final; the remainder was interlocutory. Decrees in equity are either interlocutory or final; there is no third classification (*Richmond* v. *Atwood*, 52 Fed. 10, 20-22).

Since this is a "proceeding," it is immaterial whether the decree was interlocutory or final; it was appealable in either event.

CONCLUSION.

No ground exists for issuance of the writ of certiorari in this case, and we respectfully submit that the Petition should be denied.

Respectfully submitted,

JOSEPH D. RYAN,
Attorney for Arthur F. Gourley, Respondent.